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Editorial: Douglas v Hello! - An OK! Result

Citation for published version:

Black, G 2007, 'Editorial: Douglas v Hello! - An OK! Result' SCRIPTed, vol. 4, pp. 161-65. DOI: 10.2966/scrip.040207.161

Digital Object Identifier (DOI):

[10.2966/scrip.040207.161](https://doi.org/10.2966/scrip.040207.161)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

SCRIPTed

Publisher Rights Statement:

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SCRIPT-ed

Volume 4, Issue 2, June 2007

Douglas v Hello! - An OK! result

Gillian Black *

With Big Brother 8 now underway, evidence of society's obsession with fame is not hard to find. Another group of contestants are attempting to find their 15 minutes of fame, but although most contestants sink without trace fairly rapidly there have been some who have shown staying power. Former contestant Jade Goody has become the UK's first "reality TV millionaire" (despite her unpopular profile while in the House in 2002 and again in Celebrity Big Brother in January 2007). For those that do make it, they can look forward to plenty of publicity in the tabloids and gossip magazines that feed off the public's apparent fascination with the stars of reality TV, as well as soap stars, musicians and footballers' wives.

Fame and celebrity is big business, whether you are the star, the paparazzo photographer, the publisher or even the advertiser, keen to attach a celebrity to your product. The fees involved for exclusive deals and promotion agreements are considerable: OK! has paid £1million on a number of occasions for the exclusive right to cover celebrity weddings, while international stars like David Beckham and Nicole Kidman can command substantial fees for promoting a product – Pepsi and Chanel No 5 being two relevant examples here.

Where there is commercial value, there will be commercial disputes, and the world of celebrity promotion is no different. There is no specific law regulating "celebrity exploitation" in Scotland or in England and Wales, unlike the US, for example, where a number of States have a "publicity right", created through legislation and/or case law.¹ Celebrities in the UK thus have to rely on a rather diverse range of legal doctrines in an attempt to prevent, control, or recover damages for, exploitation of their image or identity without their consent.²

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¹ For an exhaustive comparative study see Beverley-Smith, *The Commercial Appropriation of Personality*, CUP 2002.

² For example, celebrities who object to their name or image being used in advertising can turn to the doctrine of passing off, as demonstrated in Mr Justice Laddie's decision in *Irvine v Talksport* [2002] EWHC 367 (Ch).

The law in this area has recently taken a high profile step forward however (for better or worse, depending on one's stance), with the House of Lords' decision in *Douglas v Hello!*.³ The dispute kicked off in November 2000 when a paparazzo managed to surreptitiously enter the Douglasses' wedding at the Plaza Hotel in New York and, within 24 hours, sold six of his unauthorised photographs of the wedding to Hello!. Hello! had earlier been unsuccessful in its bid for the exclusive rights to publish the wedding photographs of the happy couple, which had instead gone to OK!, for a fee of £1million. An application by the Douglasses and OK! for an injunction to prevent publication by Hello! was rejected by the Court of Appeal and both OK! and Hello! published their wedding editions the following day. Thereafter, the Douglasses sought damages from Hello! for breach of privacy, while OK! sought compensation for the loss of its exclusive right to publish. The Douglasses were successful in the High Court and in the Court of Appeal. OK! on the other hand, despite its initial success in the High Court, had the award of damages in its favour overturned in the Court of Appeal and chose to appeal this decision to the Lords.

A 3-2 majority of the Law Lords found in favour of OK! and re-instated the High Court's award of £1,033,156. According to the majority, publication of the unauthorised photographs by Hello! breached OK!'s right of confidentiality in the authorised pictures⁴ and simultaneous publication by OK! of those authorised had not put the *unauthorised* images in the public domain and out of the reach of this action.⁵

I believe that the decisions of the Court of Appeal on privacy and the House of Lords on commercial confidence provide a two-tier structure for celebrities to protect and exploit their image and personal information. Rather than providing a detailed analysis of the opinion of each of their Lordships and the impact of the majority decision, I instead wish to set out the cumulative effect of these decisions.

What are the rights now enjoyed by celebrities and authorised publishers? The first thing to identify is the subject matter of any rights. In this case, the protected information was the photographs of the Douglasses' wedding. The Court of Appeal concluded that these were worthy of protection as private information in respect of the Douglasses: "Applying the test propounded by the House of Lords in *Campbell v MGN*, photographs of the wedding plainly portrayed aspects of the Douglasses' private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information."⁶ Thus, where the information in question features the private life of the individual or constitutes personal information, it will be protected against invasion by unauthorised parties through the doctrine of privacy.⁷

Although the original action by the Douglasses was based on privacy and their article 8 ECHR rights, OK!'s action in the Lords was strictly a matter of commercial confidence. The hearing in the Lords was between the authorised and unauthorised

³ *Douglas and another and others v Hello! Limited and others* [2007] UKHL 21

⁴ [2007] UKHL 21 at paras 120-122, per Lord Hoffmann.

⁵ [2007] UKHL 21 at para 307, per Baroness Hale and para 329 per Lord Brown. The contrary view was taken by Lord Nicholls: see para 257.

⁶ [2005] EWCA Civ 595 at para 95.

⁷ In reaching its decision, the Court of Appeal relied heavily upon the decision of the House of Lords in *Campbell v MGN* [2004] UKHL 22 and upon the European Court of Human Rights' decision in *von Hannover v Germany* App no 59320, 24 June 2004.

publishers of the Douglasses' wedding photographs and, as a commercial dispute, did not involve any elements of privacy or article 8 rights.

As already noted, a majority of the Lords decided that the wedding photographs were protected through confidentiality. While the nature of the information was important for the Douglasses' claim based on privacy, however, Lord Hoffmann, for the majority, was of the opinion that the breach of confidence claim by OK! did not depend on the inherent nature of the information, but rather on the fact that it was subject to control by the Douglasses: "The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information."⁸ Where an individual is in a position to control personal information, such as images of an event that can be kept secret from the outside world,⁹ he will be able to treat that information as a "conventional" trade secret¹⁰ and protect it using the doctrine of breach of confidence.

The traditional limits to breach of confidence will continue, however, and a number of their Lordships referred to these, whereby trivial information will be excluded from protection, as will any information where there is a public interest in publication.¹¹ Anything which is already in the public domain will likewise fall outwith the scope of confidential information, although it may retain its status as private information.¹²

The individual will also be able to transfer his interests in that information to another party. Although not property or intellectual property, it would appear that the information can nevertheless be licensed to third parties, who will then obtain the benefit of the confidentiality. There is a suggestion that such third party rights may depend on the fee paid. Lord Brown concluded: "Having paid £1m for an exclusive right it seems to me that OK! ought to be in a position to protect that right and to look to the law for redress were a third party intentionally to destroy it."¹³ To what extent OK! would have an enforceable right if it had paid a lesser sum remains unexplored by Lord Brown.

An individual who controls personal information would now appear to be in a powerful position. Privacy will ensure that any unauthorised intrusion can be

⁸ [2007] UKHL 21 at para 118, per Lord Hoffmann.

⁹ Celebrity birthday bashes might be one example, or the Beckham's World Cup party hosted in 2006, where the media took photographs of the guests arriving but thereafter access to the marquee was restricted.

¹⁰ See [2007] UKHL 21 at para 310, where Baroness Hale classifies the wedding photographs in this manner.

¹¹ These principles were authoritatively discussed by Lord Goff in *Attorney General v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109. For application of them in *Douglas v Hello!* see Lord Hoffmann at para 120, Lord Walker at para 272 and Baroness Hale at para 307.

¹² Jonathan Morgan, "Privacy, Confidence and Horizontal Effect: "Hello" Trouble", 2003 CLJ 444 at pp 456-457 and compare with the decision of the House of Lords in *Campbell v MGN*, [2004] UKHL 22.

¹³ [2007] UKHL 21 at para 325, per Lord Brown. Lord Hoffmann was also influenced by the fee paid by OK!: see para 117 where he emphasises the need to "keep one's eye firmly on the money". Lord Walker on the other hand disagreed with this approach – see para 299.

prevented, while breach of confidence will enable the commercial exploitation of that information. As a trade secret, exclusive and enforceable rights to that information can be transferred to another party.

Lord Walker, in his dissenting opinion, voiced concern that “it is not obvious why a claimant should be able to invoke the law’s protection for the confidentiality of his or her private life (this claim being based on the high principle of respect for human autonomy and dignity) and also to invoke its protection for the commercial confidentiality of the same or similar material, as a trade secret, until it is to be disclosed for profit at a time of his or her own choosing.”¹⁴ This, however, is the net effect of *Douglas v Hello!* in the Court of Appeal and the House of Lords, when read together.¹⁵ This may initially seem contradictory, but it is arguably no different from the rights that can be exercised by holders of intellectual property or more “traditional” property. The owner of a copyright work or of a plot of land is entitled to prevent other parties using the copyright work or the land without his consent, but he is also entitled, simultaneously, to grant rights to authorised parties to use the copyright work or the plot of land, on terms acceptable to him. In effect, this is what the Douglasses were able to do, by restricting access to their wedding: photographs of the day then became both private and confidential. Treatment of personal information as a trade secret then becomes no different from other trade secrets or from copyright or land. As Lord Hoffmann stated: “being a celebrity or publishing a celebrity magazine are lawful trades and I see no reason why they should be outlawed from such protection as the law of confidence may offer.”¹⁶

Their Lordships were keen to emphasise that this judgment does not (and should not be seen to) create an image right or an unorthodox quasi-intellectual property right.¹⁷ Importantly, although it now provides an answer in cases where personal information is exploited, it is not concerned with defamation or passing off or copyright infringement, or any of the other assorted doctrines that celebrities may try to rely upon in securing their personality rights. In particular, the factual situation and the legal basis of the case were entirely unrelated to the other leading “celebrity case”, *Irvine v Talksport*, which concerned false endorsement, rather than misuse of personal information. There is therefore still much uncertainty in the area of publicity and personality. Even those principles that can be derived from this case are not applicable throughout the UK, but only under English law: whether the Scots courts would follow suit remains to be seen.

Although this summary attempts to present the law in a reasonably coherent state, it is necessary to emphasise that the judgments of the Court of Appeal and the House of Lords are lengthy. Not only was the House of Lords divided 3-2 in favour of OK!, it is also difficult to find much internal consistency between the judgments of the three Lords who formed the majority. Despite Baroness Hale’s concern to provide a united

¹⁴ [2007] UKHL 21 at para 275, per Lord Walker.

¹⁵ The Court of Appeal’s decision was therefore appealed and eventually overturned only to the extent of OK!’s rights, and it remains the highest decision in relation to the Douglasses’ privacy rights.

¹⁶ [2007] UKHL 21 at para 124, per Lord Hoffmann.

¹⁷ See, for example, para 124, per Lord Hoffmann, Lord Walker at paras 285, 287 and 297, and Baroness Hale at para 307.

front, thereby providing “less grist to the advocates’ and academics’ mills”,¹⁸ there is certainly a difference in focus between all their Lordships, creating the impression that OK!’s victory was secured by the slimmest of margins.

Yet the very fact that we now have a decision in this area is to be welcomed, and I believe that the parties involved will welcome the commercial approach of the majority, which reflects and enables the wide-spread practice of “buying” and “selling” exclusives with celebrities. Whether any of the current occupants of the Big Brother house will need to rely on these rights is another matter entirely.

DOI: 10.2966/scrip.040207.161

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¹⁸ [2007] UKHL 21, at para 303 per Baroness Hale of Richmond